Docket No.: 30004783 US (1509-192)   PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of   : :

Inventors: Peter J. MACER et al.   :

U.S. Patent Appln. No. 09/894,917   : Group Art Unit: 2671

Filed: June 29, 2001   : Examiner: Jeffrey SWEARINGEN

For: PORTABLE ENTERTAINMENT MACHINES

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Attn: BOARD OF PATENT APPEALS AND INTERFERENCES

BRIEF ON APPEAL

Further to the Notice of Appeal filed June 15, 2005, in connection with the above-identified application on appeal, herewith is Appellant's Brief on Appeal. The Commissioner is hereby authorized to charge Deposit Account No. 08-2025 for payment of the $500 statutory fee.

To the extent necessary, Appellant hereby requests any required extension of time under 37 C.F.R. §1.136 and hereby authorizes the Commissioner to charge any required fees not otherwise provided for to **Deposit Account No. 07-1337.**

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I.   **Real Party in Interest**

The real party in interest is Hewlett-Packard Development Company, L.P., Houston, Texas.

II.   **Related Appeals and Interferences**

There are no related appeals and/or interferences.

III. **Status of Claims**

Claims 1-41 are cancelled.

No claims are allowed.

Claims 42-99 are rejected; claims 42-59 are rejected under 35 USC 101 as being directed to non-statutory subject matter; claims 42-44, 50-51, 53, 60-63, 65-67, 73-75, 77, 91 and 94 are rejected under 35 USC 102(e) as being anticipated by Hawkins (USP 6,516,202); claims 45 and 68-69 are rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of Langseth et al. (USP 6,741,980); claims 46-48 and 70-72 are rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of McDonald (USP 6,745,197); claims 52, 76 and 88-89 are rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of Giobbi (USP 6,749,510); claims 54-58 and 78-82 are rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of RFC 765, File Transfer Protocol (FTP), published October 1985; claims 59 and 83-87 are rejected under 35 USC 103(a) as being unpatentable over Hawkins

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as applied to claims 42 and 60, and further in view of Ramachandran et al. (USP 6,457,640); claim 64 is rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 60, and further in view of Khan et al. (USP 6,754,509). Claim 90 is rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 88, and further in view of Giobbi as applied to claim 88, and even further in view of Lavanchy et al. (USP 6,758,754). Claim 92 is rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 60, and further in view of CNET.com-Downloads-PalmPilot-PC-Utilities, hereafter referred to as CNET, published on June 9, 2000; claim 93 is rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 91, and further in view of Armanto et al. (USP 6,094,587). Claims 95-98 are rejected under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 61, and further in view of Ozkan et al. (USP 6,748,421). Claim 99 is rejected under 35 USC 103(a) as being unpatentable over Hawkins and Official Notice.

IV. Status of Amendments

There was no amendment after the Final Rejection.

V. Summary of Claimed Subject Matter

The claimed subject matter relates to a portable entertainment machine 1 (page 10, line 5), including a display 3, central processing unit, read only memory (ROM), and random access memory (RAM) contained within housing 2 (page 10, lines 5-

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7). Entertainment device 1 is able to communicate with a similar entertainment device 1', Figure 3, by way of a short range wireless transceiver 7, and vice versa (page 12, lines 4 and 5). The games played on machines 1 and 1' include digital game objects, such that the digital game objects of machine 1 bear reference numerals 8a-8d, while the digital game objects of machine 1' bear reference numerals 10a-10d.

The persons in possession of machines 1 and 1' are able to swap their digital game objects so that, for example, the person possessing machine 1 can transfer digital game object 8a to machine 1' (page 11, lines 22-26; page 12, lines 4-9). Such a transfer is accompanied by a transfer of a digital game object from machine 1' to machine 1 (page 12, lines 10-13). The digital game objects to be swapped are moved from retained object store 100 of the RAM to object stores 80a-80d, Figure 2 (page 11, lines 10-12). The digital game objects loaded into stores 80a-80d are displayed in window 8 of machine 1 (page 11, lines 14-15).

The digital game objects that the user of machine 1' is willing to swap with the user of machine 1 are displayed in window 10 of machine 1, as a result of processing by machine 1 of signals received by transceiver 7 from machine 1' (page 12, lines 4-9). If the user of machine 1 is interested in swapping one of the digital game objects in his machine, as displayed in window 8, with a digital game object that the person possessing machine 1' is willing to swap, as displayed in window 10 of machine 1, the user of machine 1 moves the digital game object he is willing

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to swap so it is aligned in window 8 with the digital game object that the user of machine 1' is willing to swap, as appears in window 10 (page 12, lines 4-9). Movement of the digital game objects in windows 8 and 10 is performed by pushing scroll buttons 6 and 5, respectively (page 11, line 19-page 12, line 3). Window 9 includes linking indicator 9' that links an image of the digital game object in position 8a with an image of the digital game object in position 10a (page 11, lines 22-26).

When the users of machines 1 and 1' are ready to make a swap, they activate selection buttons 4 (page 12, lines 10-13). Selection buttons 4 can also be used to access retained objects stored in store 100 of RAM to enable the digital game objects to be displayed in windows 8 and 10 (page 11, lines 2-7). In addition, buttons 4 can be used to play the games which appear on main game display 11 of machine 1. The ROM in housing 2 stores code for controlling the operations disclosed in the flow diagram of Figure 5, as briefly described _supra_.

VI.   Grounds of Rejection to be Reviewed on Appeal

A.   The rejection of claims 42-59 under 35 USC 101 as being directed to non-statutory subject matter.

B.   The rejection of claims 42-44, 50-51, 53, 60-63, 65-67, 73-75, 77, 91 and 94 under 35 USC 102(e) as being anticipated by Hawkins.

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C.   The rejection of claims 45 and 68-69 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of Langseth et al.

D.   The rejection of claims 46-48 and 70-72 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of McDonald.

E.   The rejection of claims 52, 76 and 88-89 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of Giobbi.

F.   The rejection of claims 54-58 and 78-82 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of RFC 765, File Transfer Protocol (FTP), published October 1985.

G.   The rejection of claims 59 and 83-87 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claims 42 and 60, and further in view of Ramachandran et al.

H.   The rejection of claim 64 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 60, and further in view of Khan et al.

I.   The rejection of claim 90 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 88, and further in view of Giobbi as applied to claim 88, and even further in view of Lavanchy et al.

J.   The rejection of claim 92 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 60, and further in

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view of CNET.com-Downloads-PalmPilot-PC-Utilities, hereafter referred to as CNET, published on June 9, 2000.

   K.   The rejection of claims 93 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 91, and further in view of Armanto et al.

   L.   The rejection of claims 95-98 under 35 USC 103(a) as being unpatentable over Hawkins as applied to claim 61, and further in view of Ozkan et al.

   M.   The rejection of claims 99 under 35 USC 103(a) as being unpatentable over Hawkins and Official Notice.

VII. Argument

   A.   A computer program product comprising a memory for use in a computer complies with 35 USC §101.

   Claim 42 and the claims dependent thereon, i.e., claims 43-59, are incorrectly rejected under 35 USC §101. The June 9, 2005, advisory action states a memory is not necessarily tangibly embodied by claim 42. The Advisory Action states (1) the claim is broad enough that it could encompass a memory that is not tangibly embodied, and (2) a computer program product on a memory is not necessarily a tangible embodiment, as it is not limited to a computer-readable medium.

   The foregoing statements in the Advisory Action ignore the fact that claim 42 is directed to a computer program product comprising a memory for use in a computer. An example of such a memory is a read only memory (ROM). Coverage of such memories in

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the present application is certainly warranted in view of the disclosure. Appellants are not confident that a court would rule that such memories are "a computer usable medium."

The Examiner has failed to establish a prima facie case that the requirement for a computer program product comprising a memory for a computer is not an article of manufacture. The Examiner has the burden of establishing a prima facie case that the claimed invention does not comply with 35 USC §101. He must prove the claimed invention is directed to an abstract idea or does not produce a tangible result. The Examiner has not cited a single specific example that would preclude the subject matter of claim 42 from falling within the requirements of 35 USC §101.

The position of the Examiner is contrary to In re Lowry, 32 F.3d 1579, 1583, 32 USPQ2d 1031, 1034, 1035 (Fed. Cir. 1994). In Lowry, the court ruled that if a claim defines a useful machine or manufacture by identifying the physical structure of the machine or manufacture in terms of its hardware or hardware and software combination, it defines a statutory product. Clearly, a computer program product that comprises a memory for use in a computer is a physical structure of a machine or is a manufacture. While the Lowry decision was concerned with a data structure on a computer readable medium, the decision is not limited to data structures on computer readable media. The decision is broad enough to cover any type of memory, such as a ROM. Since the examiner has not met the burden of establishing a prima facie case that the memory of claim 42 is not an article of

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manufacture, the rejection of claim 42 under 35 USC §101 cannot be sustained.

B. The rejection of claims 42-44, 50, 51, 53, 60-63, 65, 67, 73-75, 77, 91 and 92 as being anticipated by Hawkins is incorrect.

The discussions in the Office Action of independent claim 42 on pages 2 and 3 and independent claim 60 on pages 5 and 6 do not correctly analyze the requirements of claims 42 and 60 for the code and program to cause swapping signals that are representative of digital game objects for swapping digital game objects between digital object stores of two or more entertainment devices. The Final Rejection, in item 10, bridging pages 5 and 6 of the Office Action incorrectly states that Hawkins discloses an entertainment machine that can exercise at least some control over swapping digital game objects between a digital store of the entertainment machine being claimed and another entertainment machine.

With regard to the word "swapping", item 81, page 22 of the Office Action states: "Swapping files is at its most basic definition a request-response situation for a network." The Examiner provides no basis for such a definition of swapping, which is clearly not in conformance with the general definition of swapping, nor the use of swapping in the present application. Swapping is defined on page 1812 of the American Heritage Dictionary of English Language (3d ed.) (Exhibit A), as "To trade

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one thing for another"--_tr._ "to exchange one thing for another."
- "an exchange of one thing for another." From the specification
of the present application, it is also apparent that the word
"swapping" means exchanging one digital game object for another
digital game object, as indicated in the foregoing summary of the
claimed subject matter. Swapping of digital game objects is thus
not merely making a request for a digital game object and
responding to the request by, e.g., providing the digital game
object to the requester. Instead, swapping of digital game
objects requires two parties to exchange first and second digital
game objects between themselves. Based on the foregoing, the
Examiner's position that Hawkins inherently has swapping of
digital game objects is incorrect.

The allegation that swapping is inherent in Hawkins is not
supported by the rationale set forth in item 81. The rationale is
defective because it does not consider a proper definition of the
word "swapping." Further, the comments in the Office Action do
not support the requirements for inherency because they do not
indicate the Hawkins cellular telephone necessarily supports file
swapping. The statement by the Examiner in item 81 twice states,
"The Examiner believes ... " Belief by the Examiner is not enough
to establish inherency. Proof is necessary.

The fact that a certain result or characteristic may occur
or be present in the prior art is not sufficient to establish the
inherency of that result or characteristic. In re Rijckaert, 9
F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993); In re

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Oelrich, 666 F.2d 578, 581-82, 212 USPQ 323, 326 (CCPA 1981). To establish inherency, extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference and that it would be so recognized by persons of ordinary skill in the art. Inherency may not be established by possibilities or probabilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. In re Roberston, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). In relying upon a theory of inherency, the Examiner must provide a basis in fact or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the prior art. Ex parte Levy, 17 USPQ2d 1461, 1465 (BPAI 1990). Since the Examiner has provided an improper rationale and no evidence to support the various statements concerning Hawkins' alleged inherent inclusion of swapping of digital game objects, he has failed to establish inherency of such swapping.

In item 82, page 22 of the Final Rejection, the Examiner states that he "has not given game **any patentable weight**" because the meaning of what is considered a game and what is not considered a game varies greatly from person to person.

The position of the Examiner with regard to the word "game" is contrary to the official position of the Patent and Trademark Office, as set forth in the Manual of Classification. In this

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regard, CLASS 463 is entitled "AMUSEMENT DEVICES: GAMES"; Exhibit

B. SUBCLASS 1 of CLASS 463 is entitled "Including means for

processing electronic data (e.g., computer/video game, etc.)".

SUBCLASS 42, that is indented under SUBCLASS 40, that in turn is

indented under SUBCLASS 1, is entitled "NETWORK type (e.g.,

computer network, etc.)." The definition of CLASS 463, Exhibit

C, clearly indicates the Patent and Trademark Office official

position is that the word "game" has a specific meaning. The

class definition states a game is:

> Subject matter relating to the type of
> amusement, recreation, or play activity
> commonly known as a game, wherein one or
> more players or participants engage in a
> competition or contest involving skill,
> ability, strategy, or chance--against either
> another player or players or against a
> device which is intended to function as a
> competitive player or players--in order to
> achieve an objective defined by a rule or
> rules specified for a particular competition
> or contest; whereby the ultimate outcome of
> said objective in such a competition or
> contest can be determined or indicated
> according to said specified rule or rules.

The definition of class 463, subclass 1, directed to games

with means for processing electronic data, is:

> Subject matter including means for
> systematically manipulating information in
> electronically coded form in accordance with
> a program or other set of rules; means
> including or utilizing electronic logical
> calculations; electronically self-acting or
> self-regulating means for producing a
> desired response to a predetermined
> condition.

The word "game" in connection with computers is a term

widely used for specific purposes. As indicated, for example,

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from the results of a search of the Google website for the words,
"computer games" (Exhibit D), there are numerous websites devoted
to computer games. There is an *International Journal of Computer
Game Research* and *International Computer Association,* as
indicated by Exhibit D, page 1. Page 3 of Exhibit D states there
is a *Computer Games* magazine and the Yahoo website has a games
domain. Exhibit D, page 5, indicates Stanford University has a
course providing a historical and critical approach to the
evolution of computer game design; Exhibit E, pages 1-2,
discusses the course. Persons who play computer games as known as
"gamers"; Exhibit F. Based on the foregoing, the term "game" in
connection with computers clearly has a definite meaning to those
of ordinary skill in the art.

The present application, page 8, lines 4-8, indicates
digital game objects may comprise a feature, for example, a
feature which potentially assists a player to play a game to
achieve a higher score or reach a higher level of the game, such
as extra energy, additional player abilities, to control a game
element, enhancement to the powers of a game piece or character.
This statement is consistent with the PTO Manual of
Classification definition.

The Examiner, by giving the word "game" no patentable
weight, has ignored the word "game." It is, however, fundamental
that all words in a claim must be considered in judging the
patentability of that claim against the prior art. In re Wilson,
424 F.2d 1382, 1385, 165 USPQ 494, 496 (CCPA 1970). Where not

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defined in the specification, the plain meaning of a word must be in accordance with the interpretation of those of ordinary skill in the art. Rexmore Corp. v. Laitram Corp., 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001); Turo Co. v. White Consol. Ind., Inc., 199 F.2d 1295, 1299, 53 USPQ2d 1065, 1067 (Fed. Cir. 1999).

Based on the foregoing, the position set forth in item 82, page 22 of the Office Action that the meaning of "game" and "electronic game" is not entitled to patentable weight is contrary to the official position of the Patent and Trademark Office, as set forth in the definitions of CLASS 463 and SUBCLASS 1 thereof. Clearly Hawkins does not disclose anything relating to a situation involving competition or a contest as specified by the Patent and Trademark Office definition of "games." Exhibits D-F provide proof that the term "games" in connection to computers is frequently used and that those skilled in the art know what a game is.

Based on the foregoing, the Examiner is incorrect in giving no patentable weight to the terminology "game object" and "digital game object."

The Final Rejection ignores limitations of claim 43. Claim 43 requires the code to cause the machine to be capable of displaying a list of game objects held in the store and to be capable of displaying a more detailed representation of a digital game object when that object is selected by a user from the list. There is no mention of game objects in connection with the

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analysis of claim 43, nor is there any mention in the Final Rejection of displaying a more detailed representation of a digital game object that is selected. The Examiner incorrectly equivocates the name on a screen and more detailed information with the name on the screen with a digital game object. A name on a screen is not a digital game object.

Concerning claim 44, the Office Action ignores the requirement for user information on game objects, and incorrectly states there is a swapping transaction in the Hawkins device.

Claim 50 requires the code to cause the entertainment machine to be capable of transmitting an incomplete digital game object for sampling by a user of another machine. The analysis of claim 50 in item 7, page 4 of the Office Action ignores the requirement for the transmission to be of a game object. Consequently, the anticipation rejection of claim 50 is incorrect.

Further, the analysis with regard to the transmission of an incomplete digital game object is nonsense. The analysis completely ignores the requirement of the code causing the machine to be capable of transmitting an incomplete digital object. The Examiner states Hawkins transmits an incomplete digital game object by physically separating cellular component 350 from organizer 300. Obviously, such a physical separation is not performed by code, as required by claim 50. The position set forth in the Final Rejection is also pure speculation on the part of the Examiner. It seems very unlikely that cellular component

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350 would be separated from organizer 300 while any transmission was occurring, no less during transmission of a digital game object. Further, even if cellular component 350 were physically separated from organizer 300 during transmission, an incomplete digital game object <u>for sampling by the user of another machine</u> would not be transmitted.

Claim 51 requires the code to cause the entertainment machine to transmit a game object for sampling over a limited length of time to facilitate a decision being made as to whether or not the game object is to be acquired by proceeding with a swap transaction. The Final Rejection, in item 8, pages 4 and 5, states the requirements of claim 51 are satisfied by terminating the connection between cellular component 350 and organizer 300 by separating the cellular component from the organizer. Such a mechanical separation of component 350 from organizer 300 does not satisfy the requirement for code to transmit a digital game object for sampling. In addition, it does not satisfy the requirement for transmitting a game object over a limited length of time to facilitate a decision being made. The separation of cellular component 350 from organizer 300, even in accordance with the Examiner's twisted rationale, has nothing to do with transmitting a game object for sampling over a limited length of time to facilitate a decision being made as to whether or not the game object is to be acquired by proceeding with a swap transaction. As previously mentioned, it would appear extremely unlikely that cellular component 350 would be separated from

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organizer 300 while the organizer was in operation, no less while in operation to transmit a game object.

To reject claim 62, which requires a visual display to display the entire contents of a digital object store of digital game objects, item 12, page 7 of the Final Rejection equates the digital game objects with speed dial listings that the Examiner alleges are stored in read-only memory 425. The Examiner points to no portion of the Hawkins specification to support his position. The only portion of Hawkins that appears to mention read-only memory 425 is column 4, lines 8-21, which indicates read-only memory 425 includes code to install a portion of the software on organizer 300 and to uninstall the installed software. This portion of Hawkins also indicates ROM 425 includes software which is executed in-place by organizer 300. Hence, there is nothing in Hawkins to support the Examiner's position that read-only memory 425 stores speed dial listings.

The rejection of claim 62 is also speculation on the part of the Examiner. The Examiner concludes that display 810, Figure 8A of Hawkins, is able to show the entire contents of a digital object store. However, Hawkins provides no indication of the capability of a storage device for the digital object store and merely indicates that eight speed dial listings can be shown on display 810. Consequently, the rationale of the Examiner is unsupported by Hawkins.

Claim 67 requires the program of the entertainment machine of claim 60 to store control steps for causing the processor and

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digital game object store to supply to the output device user information about game objects that become potentially available to be acquired from another machine in response to the another machine being within range of the entertainment machine of claim 60. The user information enables the user of the machine to make a decision on whether or not to proceed with a potential swapping transaction.

To reject claim 67, the Examiner relies on the Hawkins speed dialing features of Figure 8A and the discussion thereof in column 7, lines 30-33. The Examiner's rationale is that if a message indicator is present, the user is able to make a decision on whether to download a voicemail, text or e-mail message. If the user decides to download the message, the Examiner alleges the Hawkins device sends information from the transmitter of the device to the similar machine.

There is nothing in Hawkins to indicate the message is sent to a similar machine to retrieve a message. In fact, it is quite likely that the message is merely sent to a central station, where the message from the similar machine is stored. It is quite unlikely that the message would be sent to the similar machine because the similar machine is likely not to be on, or within range of a cell site. Hence, the rejection of claim 67 is based on unfounded speculation on the part of the Examiner. Further, the rejection of claim 67 has nothing to do with providing information enabling a user of a portable entertainment machine to make a decision on whether or not to proceed with a potential

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swapping transaction, much less a swapping transaction of a digital game object.

Claim 73 requires the entertainment machine of claim 70 to include program storing steps for controlling a processor, transceiver and alert device for alerting the user to the availability of a potential swap in response to a signal received by a transceiver from another machine. Item 17, page 8, of the Final Rejection states the same rationale as set forth with regard to claim 49 is applicable to claim 73. The rejection of claim 49 is discussed in item 6 in the paragraph bridging pages 3 and 4 of the Final Rejection. It is there stated that if a message indicator is present, the user is able to make a decision on whether to download a voicemail, text or e-mail message. The Examiner alleges that if the user decides to download the message, the mobile computer system must send information from the transmitter to the similar machine to retrieve the message.

The allegations of the Examiner are pure speculation, as discussed, _supra_, in connection with the rejection of claim 67. Not only is the position of the Examiner speculation, it is incorrect because there is a low likelihood that the portable entertainment machine of claim 73 receives information from a transmitter of a similar machine as a result of the message indicator being present. The message undoubtedly comes from a central station, where the message is stored because of the high probability of the similar machine not being on or being out of

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range of a cell site when the user of the Hawkins device accesses his machine in response to the message indicator being activated.

Claim 74 requires the program of the entertainment machine of claim 60 to store steps for controlling the digital game object store processor and transceiver for causing the transceiver to transmit an incomplete digital game object stored in the store for sampling by the user of the another machine. To reject this claim, the Examiner relies on the same illogical rationale as set forth in the rejection of claim 50, i.e., that disconnecting cellular component 350 from organizer 300 is a stored program step, and that it results in transmission of a digital game object that is used for sampling by the user of another machine.

Claim 75 requires the program of the entertainment machine of claim 60 to store steps for controlling the digital game object store processor and transceiver so the transceiver transmits a game object for sampling over a limited length of time. To reject claim 74, the Examiner relies on the same illogical rationale as relied on to reject claim 51, i.e., that physically separating cellular component 350 from organizer 300 is a stored program step that controls a store for causing transmission of an incomplete digital game object for sampling over a limited length of time. Obviously, the game object is stated to be transmitted for sampling over a limited length of time to enable the user of the another machine to decide if he/she wants to swap the digital game object, while preventing

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the user of the other machine from keeping the game object permanently. The Examiner thus has erroneously stated Hawkins discloses the foregoing limitations of claim 75.

In rejecting claim 77 as being anticipated by Hawkins, item 20, page 9 of the Office Action states Hawkins is applied as in claim 70, upon which claim 77 depends. However, claim 70 is rejected under 35 U.S.C. §103(a) as being obvious as a result of Hawkins and McDonald. Consequently, the anticipation rejection of claim 77 is completely improper.

C.   The obviousness rejection of claims 45, 68 and 69, based on Hawkins in view of Langseth et al. is incorrect.

Claim 45 requires the computer program product of claim 42 to include code means which causes the entertainment machine to be capable of being provided by the user of the entertainment machine with a standing instruction to swap a certain game object or category of game objects in the game object store of the entertainment machine for another specified game object or category of game objects, if such a required object or object category becomes available for swap. Claim 68 includes similar limitations, but includes the machine limitations of claim 60. Claim 45, as well as claim 69, that depends on claim 68, include the additional requirement of the program conditions being imposed on the swap by the user being complied with.

Item 26, page 11, of the Final Rejection relies on Langseth et al. to disclose that it is known for a subscriber to receive a

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service from an information channel which can be delivered based
on (1) a schedule, (2) an exception or (3) upon initiation by an
external system or person. The Final Rejection relies on the
Langseth et al. disclosure of delivering personalized
information. However, there is no swapping of information, no
less swapping of game objects or categories of game objects in
Langseth et al. Instead, the user merely makes known to an
operator of the personal intelligence network that he is
interested in a particular subject and the operator of the
network sends information concerning that subject to the user.
This is not a swapping of information, but merely a statement of
interest with a reply about the thing of interest. Further, the
operator of the personal intelligence network of Langseth et al.
cannot be considered as transmitting information from an
entertainment machine of the same character as the entertainment
machine in which the computer program of claim 42 is stored or
the entertainment machine of claim 60. In this regard, claim 42
requires the swapping to be between digital object stores of two
or more such entertainment machines, which is stated in claim 42
to be portable entertainment machines. Claims 68 and 69 include a
similar limitation because claim 60 requires a short-range
wireless transceiver device to transmit and receive signals to
and from a transceiver of another portable entertainment machine.

The rejections of claims 45 and 69 are also improper because
they ignore the requirements of claim 45 for the standing
instruction to swap to include compliance with conditions imposed

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on the swap by the user and the similar requirement of claim 69 for the standing instructions to include conditions imposed on the swap by the user and for the program to store steps to execute the standing instructions only in response to the conditions being satisfied.

D. The rejection of claims 46-48 and 70-72 as being obvious as a result of Hawkins and further in view of McDonald is wrong.

In applying the Hawkins reference to the foregoing claims in item 32, page 12 of the Final Rejection, the Examiner again relies on the illogical rationale that if a message indicator is present, and the user decides to download a voicemail, text, or e-mail message, that data are transmitted and received by the Hawkins mobile computer system from a similar machine. The fallacy of this illogical rationale is discussed, _supra_, in connection with the rejection of claims 45, 68 and 69.

Item 33, bridging pages 12 and 13 of the Final Rejection, relies on McDonald to disclose multiple message stores for data objects containing text or other content. Each message store can include message stores for off-line storage that the Examiner considers to be the same as a retained object portion for storing data objects which a user has decided to keep. The relied-upon portion of McDonald, i.e., column 5, lines 8-11, states:

> Each message store constitutes an identify-
> able repository within which electronic
> messages are kept and can include an

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        integral or separate archive message store
        for off-line storage.

There is no basis to conclude that one of ordinary skill in the art would equivocate such a broad statement as appears at column 5, lines 8-11 of McDonald with the requirement of claim 46 for code of a computer program product to allocate a retained object portion of a digital game object store for storing digital game objects for which a user of a portable entertainment machine has taken a decision to retain for the time being, or for objects for which the user of the entertainment machine has not yet made a decision on whether to retain or swap.

Item 33 of the Final Rejection also states the use of an "Out Box" message folder for outgoing messages can be considered the same as code which causes allocation of a selected article window portion of a game store in which game objects can be placed for which a user has taken a preliminary decision to dispose of, provided that an exceptional swap deal can be arranged. There is no swapping disclosed by McDonald, and one of ordinary skill in the art would not have modified Hawkins to include the foregoing imitations of claim 46. Claim 70 is similar to claim 46 and is allowable with claim 46.

E.   The rejection of claim 99 as being unpatentable over Hawkins and Official Notice is wrong.

The assertion in item 80, page 21, of the Final Rejection that the limitations of method claim 99 are met by the rejections of claims 60, 67, 69, 70, 71, 72, 81 and 82 is wrong. Hawkins has

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no disclosure of transmitting first and second digital game objects from first and second user-operated portable entertainment machines. In addition, Hawkins has no disclosure of (1) responding to a decision at a first machine that a swap is desired between first and second game objects of the first and second machines, (2) removing the first game object from the store of the first machine, and (3) transmitting a third signal from the transceiver of the first machine to the transceiver of the second machine. Hawkins also has no disclosure of removing a second game object from the store of the second machine and transmitting a fourth signal from a transmitter of the second machine to the transceiver of the first machine, wherein the third and fourth signals respectively indicate a transfer of the first game object from the first machine to the second machine and a transfer of the second game object from the second machine to the first machine.

The Office Action admits Hawkins fails to disclose deleting an object from a store. The Final Rejection states that deleting objects from memories of computer devices has been well known in the art for decades. While this may be true, deletion of first and second game objects from stores of first and second entertainment machines in response to a decision at the first entertainment machine that a swap of digital game objects between the machines is desired is not obvious. The Examiner has failed to consider that the removal of the game objects is in response to such a decision.

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The remaining various rejections are of dependent claims. These rejections are improper for the same reasons set forth in connection with the claims upon which these dependent claims depend. The applied references do not cure the deficiencies of the rejections of the various claims upon which the dependent claims depend.

VIII. Conclusion

The anticipation rejection of the independent claims is wrong because Hawkins et al. fails to disclose swapping of digital game objects. The Examiner's failure to give any patentable weight to the word "game" is contrary to law and fact. It is well established that every word of a patent claim must be given due consideration. It is also well established what the meaning of the word "game" is, as exemplified by the Official Classification Index of the Patent and Trademark Office, with regard to the definition of CLASS 423, which includes computer games.

There is no swapping of objects, no less digital game objects, in Hawkins et al. Swapping of objects requires an exchange of the objects. The Examiner erroneously states that making a request and making a response constitutes a swap. However, a swap requires a quid pro quo, something that does not happen when a request is made and a response follows.

In the present invention, digital game objects are swapped by users of portable devices because the user of a first portable

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entertainment device believes that swapping a digital game object he possesses for a digital game object of a second portable entertainment device another possesses will provide the user of the first machine with the ability to win computer games that he would not otherwise win. Such a concept is completely missing from the Hawkins et al. reference, relied on for anticipation purposes.

The rejections of many of the dependent claims are completely out of order. Perhaps, the most glaring examples of the impropriety of the rejections of the dependent claims are the rejections of claims 50, 51, 74 and 75. To reject these claims the Examiner states that Hawkins, by mechanically removing cellular component 350 from organizer component 300, meets the claim requirements for a program or for coding to cause the entertainment machine to transmit an incomplete digital game object for sampling by the user of another machine, or to transmit a game object for sampling over a limited length of time.

Claims 42-59 are incorrectly rejected on 35 USC §101. The Examiner incorrectly alleges that a computer program product that is capable of being a memory is an intangible. Appellants have demonstrated that these claims read on a read only memory. The Examiner has provided no basis to support his position that recitation of a memory does not fall within the requirements of 35 USC §101. Clearly, a memory is an article of manufacture.

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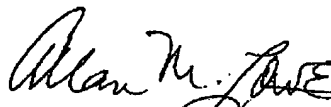Based on the foregoing, each of appealed claims 42-99 is allowable and overruling of the rejections by the Examiner is in order.

Respectfully submitted,
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IX. Claims Appendix

Claim 42: A computer program product comprising a computer usable medium or a memory for use in a computer, the medium or memory having computer readable program code embodied therein executable by a portable entertainment machine which comprises a short-range wireless transceiver device capable of transmitting and receiving signals to and from the transceiver of another portable entertainment device, and a manually operable control adapted to permit the user of the entertainment machine to exercise at least some control over the use of the transceiver device: the computer program product comprising code that when loaded into the portable entertainment machine causes the portable entertainment machine to be capable of swapping, by way of the transceiver device, signals that are representative of digital game objects for swapping digital game objects between digital object stores of two or more such entertainment machines.

Claim 43: A computer program product as claimed in claim **42**, comprising code which causes the machine to be capable of displaying a list of the game objects held in the store, and to be capable of displaying a more detailed representation of a digital game object when that object is selected by a user from the list.

Claim 44: A computer program product as claimed in claim **42**, comprising code which causes the machine to be adapted to provide

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to the user information on game objects that become potentially available to be acquired from a similar machine that comes within range of the machine, to enable the user to take a decision on whether or not to proceed with a potential swapping transaction.

Claim 45:   A computer program product as claimed in claim **42**, comprising code which causes the machine to be capable of being provided by the user with a standing instruction to swap a certain game object or category of game objects in the game object store for another specified game object or category of game objects if such a required object or object category becomes available for swap, and any conditions imposed on the swap by the user are complied with.

Claim 46:   A computer program product as claimed in claim **42**, comprising code which causes the machine to allocate a retained object portion of the digital object store for storing objects for which the machine user has taken a decision to retain at least for the time being, or for objects for which the user has not yet taken a decision on whether to retain or swap, and to allocate a selected article window portion of the game store in which game objects can be placed for which the user has taken at least a preliminary decision to dispose of provided that an acceptable swap deal can be arranged.

Claim 47:   A computer program product as claimed in claim **46**, wherein the product comprises code which causes the machine to

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operate such that when the user's machine is within range of another similar machine information is transmitted to the other machine to inform the other machine of the content of the selected article window store.

Claim 48: A computer program product as claimed in claim **47**, in which the product comprises code which causes a display of the machine to comprise a reciprocal display portion adapted to display the content of the selected article window store of another machine which is within range.

Claim 49: A computer program product as claimed in claim **42**, comprising code which causes the machine to issue an alert to the user upon the availability of a potential swap.

Claim 50: A computer program product as claimed in claim **42**, comprising code which causes the machine to be capable of transmitting an incomplete digital game object for sampling by the user of another machine.

Claim 51: A computer program product as claimed in claim **42**, comprising code which causes the machine to transmit a game object for sampling over a limited length of time to facilitate a decision being made as to whether or not the game object is to be acquired by proceeding with a swap transaction.

Claim 52: A computer program product as claimed in claim **42**, in which the game object includes a game program, the program

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comprising code for configuring the machine whereby the current owner of the game can allow the user of another similar machine within range to sample playing of the game by exercising game control over the wireless connection, the game being run on the machine of the current game owner.

Claim 53: A computer program product as claimed in claim **42,** comprising code which configures the manually operable control to enable the user of the machine to select which game objects are transferred from the retention portion of the store to the selected article window portion of the store and vice-versa.

Claim 54: A computer program product as claimed in claim **42,** comprising code which configures the machine to provide a swap proposal indicator for indicating to another, similar machine the swap transaction being proposed.

Claim 55: A computer program product as claimed in claim **54,** in which the swap proposal indicator comprises a linking indicator function adapted to link the representations of the digital game objects held by the two machines in their selected article window stores, and to communicate that link indicator to the other machine.

Claim 56: A computer program product as claimed in claim **55,** comprising code which configures the machine to provide a swap approval indicator which is arranged to respond to transmit a

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response to the other machine in answer to the output of the linking indicator function of the machine which first suggests a swap proposal.

Claim 57:   A computer program product as claimed in claim **42**, comprising code which configures the machine to provide a swap control function arranged to be initiated on acceptance of a proposed swap by a similar such machine.

Claim 58:   A computer program product as claimed in claim **57**, comprising code which provides a swap protocol that ensures that the data objects that have been agreed to be swapped are transmitted simultaneously by the two machines.

Claim 59:   A computer program product as claimed in claim **42**, comprising code which configures the machine for enabling data objects to be loaded into the machine by purchasing transaction from a data object vendor rather than by a data object swapping transaction.

Claim 60:   A portable entertainment machine comprising:

a digital object store adapted to store digital game objects;

a short-range wireless transceiver device capable of respectively transmitting and receiving signals to and from a transceiver of another portable entertainment machine, the signals being representative of a digital game object;

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a user-activated control;

an output device;

an electronic processor; and

a memory storing a program, the memory program being coupled with the control, the transceiver, the electronic processor, the output device, and the digital object store so that in response to the user responding to the output device and activating the control, the program stored in the memory causes the transceiver to be coupled to be responsive to the store and to the transceiver of another machine so the user of the entertainment machine can, by using the control, exercise at least some control over swapping of digital game objects between the digital object store of said other entertainment machine;

a housing carrying the store, transceiver, processor, output device, control and memory, the housing and the things in it having a weight and size enabling the housing to be held by the user.

Claim 61: A machine as claimed in claim **60,** wherein the output device comprises a visual display.

Claim 62: A machine as claimed in claim **61,** wherein the display is adapted to display the entire contents of the digital object store.

Claim 63: A machine as claimed in claim **61,** wherein the display is adapted to display a list of the game objects held in

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the store and is capable of displaying a more detailed representation of a particular digital game object in response to the user activating the control to select the particular game object from the list.

Claim 64: A machine as claimed in claim **60**, wherein the control includes a voice-activated control.

Claim 65: A machine as claimed in claim **60**, wherein the control includes a hand responsive device.

Claim 66: A machine as claimed in claim **60**, wherein the size of the housing is such that the housing can be put in a clothes pocket of the user.

Claim 67: A machine as claimed in claim **60**, wherein the program stores control steps for causing the processor and digital game object store to supply to the output device user information about game objects that become potentially available to be acquired from the another machine in response to the another machine being within range of the machine, the user information enabling the user of the machine to make a decision on whether or not to proceed with a potential swapping transaction.

Claim 68: A machine as claimed in claim **60**, wherein the program stores control steps for causing the processor, transceiver and digital game object store to respond to and

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execute an output of the control indicative of a standing
instruction to swap a certain game object or category of game
objects in the object store for another specified game object or
category of game objects in response to the transceiver receiving
a signal that such a required object or object category becomes
available for swap.

Claim 69:   A machine as claimed in claim **68,** wherein the
standing instructions include conditions imposed on the swap by
the user, the program storing steps for causing the processor,
transceiver and digital store to execute the standing
instructions only in response to the condition being satisfied.

Claim 70:   A machine as claimed in claim **60,** in which the
digital game object store comprises a retained game object
portion for storing game objects for which the machine user has
taken a decision to retain at least for the time being or for
game objects for which the user has not yet taken a decision on
whether to retain or swap, and a selected article window portion
of the data store where game objects are stored for which the
user has taken at least a preliminary decision to dispose of
provided that an acceptable swap deal can be arranged, the
program storing control steps for causing the processor and
object store to interact in response to the control for causing
the retained game object portion to store the game objects for
which the machine user has taken a decision to retain at least

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for the time being and game objects for which the user has not yet taken a decision on whether to retain or swap, and store in the selected article window portion the game objects the user has taken at least a preliminary decision to dispose of provided that an acceptable swap deal can be arranged.

Claim 71: A machine as claimed in claim **70**, wherein the program stores steps for activating the processor, digital object store, and transceiver such that in response to the user's machine being within range of another similar machine information is transmitted via the transceiver to the other machine to inform the other machine of the content of the selected article window store.

Claim 72: A machine as claimed in claim **71**, wherein the output device includes a visual reciprocal display portion, the program storing steps for controlling the reciprocal display portion, processor, and transceiver for causing the reciprocal display portion to display the content of the selected article window store of the another machine.

Claim 73: A machine as claimed in claim **60**, wherein the output device includes an alert device, the program storing steps for controlling the processor, transceiver and alert device for alerting the user to the availability of a potential swap in response to a signal received by the transceiver from the another machine.

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Claim 74:   A machine as claimed in claim **60,** wherein the program stores steps for controlling the store, processor and transceiver for causing the transceiver to transmit an incomplete digital game object stored in the store for sampling by the user of the another machine.

Claim 75:   A machine as claimed in claim **60,** wherein the program stores steps for controlling the store, processor and transceiver for causing the transceiver to transmit a game object for sampling over a limited length of time.

Claim 76:   A machine as claimed in claim **60,** wherein the data object includes a game program, and the program stores steps for controlling the store, processor and transceiver for causing (a) the transceiver to transmit a signal indicating the current owner of the game program will allow the user of the another similar machine within range to sample playing of the game by exercising game control via the transceiver of the machine and (b) the game program to be run on the machine of the current game owner in response to signals received by the transceiver of the machine from the transceiver of the another machine.

Claim 77:   A machine as claimed in claim **70,** wherein the program stores steps for controlling the processor, the retention and the selected article window portions for transferring selected data objects in response to a user activation of the control from the retention portion of the store to the selected

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article window portion of the store and vice-versa in response to user activation of the control.

Claim 78:   A machine as claimed in claim **60**, wherein the output machine includes a swap proposal indicator, and wherein the program stores steps for controlling the store, processor and transceiver for causing the transceiver to transmit to another, similar machine a signal indicating the swap transaction being proposed.

Claim 79:   A machine as claimed in claim **78**, wherein the program stores steps for controlling the processor, the transceiver, and the output device for causing the swap proposal indicator to indicate a linking function for linking the representations of the digital data objects stored by the two machines in their selected article window stores, and to communicate the link indicator to the other machine via the transceiver of the machine.

Claim 80:   A machine as claimed in claim **79**, wherein the output device includes a swap approval indicator, and wherein the program stores steps for controlling the processor, the transceiver, and the output device for causing the transceiver to transmit a response to the other machine in answer to the output of the linking indicator function of the machine which first suggests a swap proposal.

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Claim 81:   A machine as claimed in claim **60**, wherein the program stores steps for controlling the store, processor and transceiver for causing swap to be initiated in response to acceptance of a proposed swap by the another machine.

Claim 82:   A machine as claimed in claim **81**, wherein the program stores steps for controlling the store, processor, and transceiver for causing a swap protocol to be used between the machine and the another machine such that the data objects that have been agreed to be swapped are transmitted simultaneously by the transceivers of the two machines.

Claim 83:   A machine as claimed in claim **60**, further including a game object input, the program storing steps for controlling the store and processor to cause a game object to be loaded into the store of the machine in response to activation of the game object input, the program further storing steps for controlling the game object input in response to a purchasing transaction communicated from ·the machine to a game object vendor.

Claim 84:   A machine as claimed in claim **83**, in which the game object input comprises a reader adapted to read a physical storage medium, the program storing steps for causing the reader to load purchased game objects into the machine store.

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Claim 85:   A machine as claimed in claim 84, wherein the program includes steps for disabling the storage medium following reading of the medium.

Claim 86:   A machine as claimed in claim 83, wherein the program includes steps for controlling the processor, transceiver and store for causing the game object to be supplied to the store from the vendor via the transceiver.

Claim 87:   A machine as claimed in claim 86, wherein the transceiver is included in a cellular telephone device.

Claim 88:   A machine as claimed in claim 60, wherein the digital data object includes a game program, the program in the memory including steps for controlling the game program and the processor for causing the game program to be run on the entertainment machine so the user can play the game on the game program.

Claim 89:   A machine as claimed in claim 88, wherein the game program of the digital data object involves an additional player or players, the program in the memory including steps for controlling the game program, the processor, the output device and the transceiver so the additional player or players can communicate, via the transceiver, with the said entertainment machine on which the game is run, the communication being in such a manner that the additional player or players cannot gain access

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to a copy of the game program stored in the store through playing the game.

Claim 90:   A machine as claimed in claim **88,** wherein the digital data object comprises a game feature for assisting a player to play a game.

Claim 91:   A machine as claimed in claim **61,** wherein the processor and program enable the machine to be operable as a mobile telephone, said display being used to display telephone functions of the telephone.

Claim 92:   A machine as claimed in claim **60,** wherein the digital game object includes an enhancement to the functionality of the machine.

Claim 93:   A machine as claimed in claim **91,** wherein the digital object store stores a ring tone.

Claim 94:   Apparatus to enable a plurality of players to swap digital objects, the apparatus comprising a short-range wireless network, the network including a plurality of portable entertainment machines as claimed in claim **60,** each of the machines being adapted to be carried by a different user.

Claim 95:   A machine as claimed in claim **61,** wherein the store stores information enabling the game objects to be stored in the form of a decorative virtual card or token, the program

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steps for controlling the store, processor and display including steps for causing the display to display the game object in the form of the decorative virtual card or token.

Claim 96: A machine as claimed in claim **61**, wherein the store stores information enabling the game objects to be stored in the form of a moving image, the program steps for controlling the store, processor and display including steps for causing the display to display the game object in the form of the moving image.

Claim 97: A machine as claimed in claim **61**, wherein the store stores information enabling the game objects to be stored in the form of a moving image and associated textual·information, the program steps for controlling the store, processor and display including steps for causing the display to display the game object in the form of the moving image and associated textual information.

Claim 98: A machine as claimed in claim **61**, wherein the store stores information enabling the game objects to be stored in the form of a moving image and associated audio information, the program steps for controlling the store, processor, and display including steps for causing the display game to display the game object in the form of the moving image and associated audio information.

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Claim 99: A method of swapping digital game objects between first and second user-operated portable entertainment machines, each of the machines including a digital object store that stores digital game objects and a short-range wireless transceiver, the method comprising:

transmitting, from the transceiver of the first machine to the transceiver of the second machine, a first signal representing a first digital game object stored in the store of the first machine;

receiving the first signal at the transceiver of the second machine;

responding to the first signal, as received by the transceiver of the second machine, by deriving at the second machine a first indication of the first game object;

responding to the first indication by making a decision at the second machine as to whether a swap is desired between a second digital game object stored in the store of the second machine and the first game object;

in response to the decision being yes, transmitting from the transceiver of the second machine to the transceiver of the first machine a second signal representing a second digital game object stored in the store of the second machine;

receiving the second signal at the transceiver of the first machine;

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responding to the second signal, as received by the transceiver of the first machine, by deriving at the first machine a second indication of the second game object;

responding to the second indication by making a decision at the first machine as to whether a swap is desired between the first and second game objects;

in response to the decision at the first machine being yes, removing the first game object from the store of the first machine and transmitting a third signal from the transceiver of the first machine to the transceiver of the second machine and removing the second game object from the store of the second machine and transmitting a fourth signal from the transceiver of the second machine to the transceiver of the first machine, the third and fourth signals respectively indicating a transfer of the first game object from the first machine to the second machine and a transfer of the second game object from the second machine to the first machine;

responding, at the first machine, to receipt of the fourth signal by loading an indication of the second game object into the store of the first machine; and

responding, at the second machine, to receipt of the fourth signal by loading an indication of the first game object into the store of the second machine.

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X.   Exhibits

A.   Definition of "Swap", *American Heritage Dictionary
       of English Language* (3d ed.)

B.   CLASS 463 "AMUSEMENT DEVICES: GAMES"

C.   Definition of CLASS 463

D.   Google search for "Computer Games"
            International Journal of Computer Game Research
            International Computer Association
            Computer Games magazine
            Yahoo games domain
            Stanford U. course, computer game design

E.   Stanford course on computer games

F.   Definition of 'GAMERS'